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PLEASE REMIT ALL CORRESPONDENCE TO THE AMBLER OFFICE

February 12, 2004

Michael E. Kunz, Esquire, Clerk
United States District Court for the Eastern District of Pennsylvania
2609 U.S. Courthouse
601 Market Street
Philadelphia, PA 19106

Re: James M. Desiderio, Jr. v. Winnebago Industries, et al.
USEDPA No. 02-4677

Dear Mr. Kunz:

Enclosed please find an original and one copy of Plaintiff, James M. Desiderio, Jr.'s Motion to Enforce Settlement Agreement. Also enclosed is a disc containing the Motion. Kindly file the original with your office and return the copy time stamped to my attention in the enclosed self addressed stamped envelope.

Very Truly Yours,

Louis Dobi, Jr., Esquire

Enc. Motion to Enforce Settlement Agreement
cc: Charles C. Sweedler, Esquire
Wayne Graver, Esquire
Amanda R. Trask, Esquire
Michael B. Pullano, Esquire
Beth A. Carter, Esquire

IN THE EASTERN DISTRICT OF PENNSYLVANIA
CIVIL DIVISION

JAMES M. DESIDERIO, JR.	:	
V.	:	DOCKET NO. CV-02-4677
WINNEBAGO INDUSTRIES	:	
AND	:	
FREIGHTLINER CUSTOM	:	
CHASSIS/ALLIANCE, WARRANTY	:	
DEPT.	:	
AND	:	
CATERPILLAR, INC.,	:	
ENGINE DIVISION	:	
AND	:	
ALLISON TRANSMISSIONS	:	
AND	:	
MEYERS CAMPERS	:	

ORDER

AND NOW, this day of , 2004, upon consideration of the within Motion to Enforce Settlement Agreement, it is hereby DIRECTED and ORDERED that Defendant Caterpillar Inc. pay within three (3) business days, to Plaintiff \$2,500.00, which Plaintiff is entitled to under the terms of said settlement agreement, and pay an additional \$350.00 for the two (2) attorney hours spent preparing the instant motion

BY THE COURT:

J.

**IN THE EASTERN DISTRICT OF PENNSYLVANIA
CIVIL DIVISION**

JAMES M. DESIDERIO, JR.	:	
V.	:	DOCKET NO. CV-02-4677
WINNEBAGO INDUSTRIES	:	
AND	:	
FREIGHTLINER CUSTOM	:	
CHASSIS/ALLIANCE, WARRANTY	:	
DEPT.	:	
CATERPILLAR, INC.,	:	
ENGINE DIVISION	:	
AND	:	
ALLISON TRANSMISSIONS	:	
AND	:	
MEYERS CAMPERS	:	

PLAINTIFF'S MOTION TO ENFORCE SETTLEMENT AGREEMENT

1. On or about July 15, 2002, Plaintiff commenced this Action seeking damages under the Federal Magnuson Moss Warranty Improvement Act and Pennsylvania's Unfair Trade Practices and Consumer Protection Law in the United States District Court for the Eastern District of Pennsylvania.

2. On or about June 16, 2003, the matter was settled between all parties. See confirmation letter dated June 16, 2003, attached hereto as Exhibit "A."

3. This settlement agreement provided that Defendant Winnebago Industries pay Plaintiff \$11,500.00, Defendant Caterpillar Inc. pay Plaintiff \$2,500.00, and Defendant Freightliner Custom Chassis pay Plaintiff \$1,000.00 in exchange for an executed General Release. See Settlement Agreement and General Release, attached hereto as Exhibit "B."

4. The total settlement agreement represented \$10,000.00 in damages to Plaintiff and \$5,000.00 payable to Plaintiff's counsel for attorney's fees and costs.

5. Plaintiff executed the General Release on or about September 22, 2003, a copy of which was provided to each defendant's respective counsel.

6. On or about October 17, 2003, counsel for Defendant Freightliner forwarded to counsel for Plaintiff a settlement draft in the amount of \$1,000.00.

7. On or about January 23, 2004, counsel for Defendant Winnebago forwarded to counsel for Plaintiff a settlement draft in the amount \$11,500.00.

8. To date, counsel for Defendant Caterpillar has failed to honor the terms of the settlement agreement reached on June 16, 2003.

9. Plaintiff has fully and completely complied with the terms of the settlement agreement between the parties.

10. Counsel for Plaintiff, and the agents thereof, has made numerous attempts to effect the settlement as agreed to by the Parties.

11. To date, Defendant Caterpillar has failed and continues to fail to comply with its legal obligations under the settlement agreement of June 16, 2003, and Plaintiff remains without satisfaction to which he is entitled under said agreement.

12. Counsel for Defendant Caterpillar has offered no legitimate excuse for Defendant's dilatory conduct.

13. Plaintiff has been and continues to be harmed as a result of Defendant Caterpillar's dilatory conduct.

14. Plaintiff and Plaintiff's counsel have made every diligent effort to resolve this matter without burdening the court with motion practice or re-opening the case, however,

such efforts have been fruitless and the court's intervention is the only available remedy remaining.

15. Plaintiff's counsel has incurred considerable expenses as a result of Defendant Caterpillar's failure to comply with the settlement agreement between the parties.

16. The undersigned spent two (2) hours preparing and drafting the instant motion.

17. Counsel for Plaintiff's hourly billing rate is \$175.00 for associates. As this is a statutory fee case, counsel for Plaintiffs' fees and costs expended to enforce settlement are fully compensable. Counsel for Plaintiff is more than reasonable in this regard as she does not seek compensation for the countless hours of support staff time involved to date.

18. Given the clarity of the issues raised herein, Plaintiff respectfully requests that this Honorable Court issue the Order proposed at its earliest convenience or shorten the time for Defendant to file a Response.

WHEREFORE, Plaintiff requests this Honorable Court to enforce the settlement of June 16, 2003, by (1) ordering Defendant Caterpillar Inc. to pay Plaintiff \$2,500.00, to which Plaintiff is entitled under the terms of said settlement agreement, and (2) ordering Defendant Caterpillar to pay, within three (3) business days, an additional \$350.00 for the two (2) attorney hours spent preparing the instant motion.

Respectfully submitted,

KIMMEL & SILVERMAN, P.C.

By _____
Louis Dobi, Jr., Esquire
Attorney for Plaintiff
30 East Butler Pike
Ambler, Pennsylvania 19002
(215) 540-8888

**IN THE EASTERN DISTRICT OF PENNSYLVANIA
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ENGINE DIVISION	:	
AND		
ALLISON TRANSMISSIONS	:	
AND		
MEYERS CAMPERS	:	

**PLAINTIFF'S BRIEF IN SUPPORT OF
MOTION TO ENFORCE SETTLEMENT**

I. Factual Background

On or about July 15, 2002, Plaintiff commenced Action seeking damages under the Federal Magnuson Moss Warranty Improvement Act and Pennsylvania's Unfair Trade Practices and Consumer Protection Law in the United States District Court for the Eastern District of Pennsylvania.

On or about June 16, 2003, the matter was settled between all parties. See Exhibit "A." This settlement agreement provided that Defendant Winnebago Industries pay Plaintiff \$11,500.00, Defendant Caterpillar Inc. pay Plaintiff \$2,500.00, and Defendant Freightliner Custom Chassis pay Plaintiff \$1,000.00 in exchange for an executed General Release. See Exhibit "B."

The total settlement agreement represented \$10,000.00 in damages to Plaintiff and \$5,000.00 payable to Plaintiff's counsel for attorney's fees and costs. Plaintiff executed the General Release on or about September 22, 2003, a copy of which was provided to each defendant's respective counsel. On or about October 17, 2003, counsel for Defendant Freightliner forwarded to counsel for Plaintiff a settlement draft in the amount of \$1,000.00. On or about January 23, 2004, counsel for Defendant Winnebago forwarded to counsel for Plaintiff a settlement draft in the amount \$11,500.00. To date, counsel for Defendant Caterpillar has failed to honor the terms of the settlement agreement reached on June 16, 2003.

Plaintiff has fully and completely complied with the terms of the settlement agreement between the parties. Counsel for Plaintiff, and the agents thereof, has made numerous attempts to effect the settlement as agreed to by the Parties. To date, Defendant Caterpillar has failed and continues to fail to comply with its legal obligations under the settlement agreement of June 16, 2003, and Plaintiff remains without satisfaction to which he is entitled under said agreement.

Counsel for Defendant Caterpillar has offered no legitimate excuse for Defendant's dilatory conduct. Plaintiff has been and continues to be harmed as a result of Defendant Caterpillar's dilatory conduct. Plaintiff and Plaintiff's counsel have made every diligent effort to resolve this matter without burdening the court with motion practice or re-opening the case, however, such efforts have been fruitless and the court's intervention is the only available remedy remaining.

Plaintiff's counsel has incurred considerable expenses as a result of Defendant Caterpillar's failure to comply with the settlement agreement between the parties. The

undersigned spent two (2) hours preparing and drafting the instant motion. Counsel for Plaintiff's hourly billing rate is \$175.00 for associates. As this is a statutory fee case, counsel for Plaintiffs' fees and costs expended to enforce settlement are fully compensable. Counsel for Plaintiff is more than reasonable in this regard as she does not seek compensation for the countless hours of support staff time involved to date.

II. Argument

A trial court before which a case is pending may enforce a settlement agreement voluntarily undertaken and assented to by the parties. *See Morris v. Gaspero*, 522 F. Supp. 121, 125 (E.D. Pa. 1981). In the instant matter, the parties voluntarily entered into a settlement agreement on June 16, 2003. To date, Defendant Caterpillar Incorporated has failed to abide by the terms of the settlement agreement. Furthermore, Defendant Caterpillar Incorporated has not notified Plaintiff's counsel that they allege that the settlement agreement was reached by fraud, mutual mistake or tortious conduct, which are the only grounds upon which a party may seek to rescind an otherwise enforceable settlement agreement. *See Greentree Cinemas, Inc. v. Hakim*, 289 Pa. Super. 39, 432 A.2d 1039 (1981).

Motions for enforcement of settlement agreements resemble motions for summary judgment; therefore, courts must employ a similar standard of review. *See Tiernan v. Devoe*, 923 F.2d 1024 (3rd Cir. 1991). In the instant matter, the terms of the settlement agreement are not in dispute. All parties to the instant action agreed to the terms of the settlement agreement on June 13, 2003. Since the settlement agreement, Defendant Caterpillar has not offered any objection either to the terms of the settlement agreement or the language of the General Release to be signed by all parties. In fact, despite

numerous attempts by Plaintiff's counsel to seek Defendant Caterpillar's compliance with the settlement agreement, Defendant Caterpillar has offered no explanation for their failure to comply.

In addition to the enforcement of the settlement agreement, Plaintiff requests that the court award it the attorneys' fees it expended as a result of having to bring this motion. "When a party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons" the court has discretionary power to award attorneys' fees. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45-46, 115 L.Ed. 2d 27, 111 S.Ct. 2123 (1991). It has been held that refusal to abide by the terms of a settlement agreement can constitute bad faith, entitling the wronged party to attorneys' fees. *See Interspiro USA, Inc. v. Figgie Int'l, Inc.*, 815 F. Supp. 1488 (D. Del. 1993).

In the present case, Defendant Caterpillar has refused to comply with its obligation to pay Plaintiff \$2,500.00 under the terms of the settlement agreement reached on June 13, 2003. As a result, Plaintiff's counsel has incurred additional legal fees attempted to enforce the settlement agreement in a case that settled nearly eight months ago. There is no justification for Defendant Caterpillar's continued failure to abide by the terms of the settlement agreement reached on June 13, 2003. An award of attorneys' fees is reasonable under such circumstances.

III. CONCLUSION

WHEREFORE, Plaintiff requests this Honorable Court to enforce the settlement agreement of June 13, 2003, by (1) ordering Defendant Caterpillar to pay, within three (3) business days, to Plaintiff \$2,500.00, which Plaintiff is entitled to under the terms of the settlement agreement reached between the parties; and (2) ordering Defendant

Caterpillar to pay within three (3) business days, an additional \$350.00 for the two attorney hours spent preparing the instant motion.

Respectfully submitted,

KIMMEL & SILVERMAN, P.C.

Louis Dobi, Jr., Esquire
Attorney for Plaintiff

VERIFICATION

Louis Dobi, Jr., states that he is the attorney for the Plaintiff herein; that he is acquainted with the facts set forth in the foregoing Motion; that same are true and correct to the best of her knowledge, information and belief; and that this statement is made subject to the Penalties of 18 Pa. C.S.A. §4904, relating to unsworn falsifications to authorities.

Louis Dobi, Jr., Esquire
Attorney for Plaintiff

**IN THE EASTERN DISTRICT OF PENNSYLVANIA
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DEPT.		
	AND	:
CATERPILLAR, INC.,		
ENGINE DIVISION		
	AND	:
ALLISON TRANSMISSIONS		
	AND	:
MEYERS CAMPERS		

CERTIFICATE OF SERVICE

I, Louis Dobi, Jr., Esquire, counsel for Plaintiff, do hereby certify I served all parties with true and correct copies of the foregoing Motion and accompanying brief, by U.S. Mail, postage prepaid, addressed as follows:

Michael B. Pullano, Esquire
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 Philadelphia, PA 19106

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CATERPILLAR, INC.,	:	
ENGINE DIVISION	:	
AND	:	
ALLISON TRANSMISSIONS	:	
AND	:	
MEYERS CAMPERS	:	

CERTIFICATE OF SERVICE, CONTINUED

Beth A. Carter, Esquire
Bennett, Bricklin & Saltzburg, LLP
1601 Market Street, 16th Floor
Philadelphia, PA 19103

Respectfully submitted,

KIMMEL & SILVERMAN, P.C.

By: _____

Louis Dobi, Jr., Esquire
Attorney for Plaintiff
30 East Butler Pike
Ambler, Pennsylvania 19002
(215) 540-8888

Date: _____